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No. 98-1068

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

MAGNOLIA VENTURE CAPITAL CORPORATION,
Petitioner,

v.

MISSISSIPPI DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT,
Respondent.

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Court of Appeals for the Fifth Circuit concerned lack of authority to waive Eleventh Amendment sovereign immunity. That decision is consistent with prior Supreme Court rulings. The Petition for Writ of Certiorari seeks the unprecedented extension of a unique rule of admiralty law to eviscerate Eleventh Amendment sovereign immunity in bankruptcy. Because the State of Mississippi has strong claims (including a perfected security interest) to the funds involved in this dispute, which are public funds, the admiralty case relied upon by Petitioner is inapplicable. The Petition presents no conflict with precedent, no important question of constitutional law, and no conflict with decisions of other federal Courts of Appeal.

SUPPLEMENT TO STATEMENT OF THE CASE

The Mississippi Legislature, in addition to creating Magnolia Capital Corporation ("MCC") and Magnolia Venture Capital Corporation ("Magnolia Venture"), also created Magnolia Venture Capital Fund Limited Partnership ("MVCF") through the Mississippi Venture Capital Act of 1994, Miss. Code Ann. §57-77-1 et seq. (Supp. 1998). The funds at issue, held by Prudential Security, Inc., exceed $11 million and are public funds. Miss. Code Ann. §57-77-3 (Supp. 1998).

The Loan Agreement with the Mississippi Department of Economic and Community Development ("MDECD"), a state agency, provided that, upon default, all assets held by Magnolia Venture, MCC, and MVCF were to be returned to MDECD. A Pledge Agreement was entered into between

Magnolia Venture and MDECD which pledged all of the assets of Magnolia Venture and MVCF to MDECD. This Pledge Agreement security was perfected by a UCC-1 Financing Statement filed with the office of the Mississippi Secretary of State.

On or about May 16, 1997, Magnolia Venture filed an adversary proceeding complaint against MDECD requesting the Bankruptcy Court to adjudicate that the Pledge Agreement between Magnolia Venture and MDECD was void and that MDECD had no claim against Magnolia Venture. MDECD responded with a motion to dismiss the complaint as being barred by the Eleventh Amendment.

On June 4, 1997, Magnolia Venture voluntarily dismissed the adversary proceeding against MDECD and filed a new adversary proceeding against Prudential Security, Inc. ("Prudential"). This is the

proceeding presently before this Court. The adversary proceeding against Prudential sought to release Prudential's freeze on the assets in the Prudential investment accounts and further sought a declaratory judgment that the assets held by Prudential were the property of Magnolia Venture, free and clear of any claim or lien of any third party, including MDECD. MDECD intervened. Prudential and MVCC filed third party claims and cross-claims against MDECD. MDECD filed the Motion to Dismiss, which is the subject of the present Petition, based on Eleventh Amendment immunity. Magnolia Venture's requested relief in the Complaint styled against Prudential--return of the funds free of any interest of the State of Mississippi--was the same as in the Complaint styled against MDECD, artful pleading notwithstanding.

REASONS FOR NOT GRANTING THE WRIT

Because of the Fifth Circuit's

decision in Department of Transportation and Development, State of Louisiana v. PNL Asset Management Co. (In re Fernandez), 123 F.3d 241 (5th Cir. 1997), amended on denial of reh'g, 130 F.3d 1138 (5th Cir. 1997), holding unconstitutional the attempt by Congress to abrogate Eleventh Amendment immunity through the Bankruptcy Code, abrogation of Eleventh Amendment immunity was not an issue in this case. At issue was whether MDECD possessed the authority to waive, and whether it had waived, the State of Mississippi's Eleventh Amendment immunity through a venue provision in the Pledge Agreement. Without deciding whether an attempt to waive sovereign immunity had been made, the Fifth Circuit recognized that MDECD lacked the specific express authorization to waive Mississippi's Eleventh Amendment immunity. (Petition Appendix 19a) This holding is consistent with previous decisions of this Court that

a state's authority to waive Eleventh Amendment immunity can arise only by state law, statutory or constitutional. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241, 105 S.Ct. 3142, 3146-47, 87 L.Ed.2d 171 (1985); Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 467-9, 65 S.Ct. 347, 352-3, 89 L.Ed. 389 (1945). This holding by the Fifth Circuit is further consistent with previous decisions of this Court that a state's waiver of Eleventh Amendment immunity must be express and unequivocal. Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304-07, 110 S.Ct. 1868, 1872-73, 109 L.Ed.2d 264 (1990); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241, 105 S.Ct. 3142, 3146-47, 87 L.Ed.2d 171 (1985); and Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984).

Magnolia Venture's bankruptcy filing was an attempt to avoid state court litigation rather than a need for bankruptcy reorganization. If Magnolia Venture successfully sets aside the State's interest in the funds, it will have in excess of $11 million in liquid funds and only a few thousand dollars of debt. Clearly there would be no need for bankruptcy reorganization. Should Magnolia Venture be unsuccessful and the funds returned to the State of Mississippi, it will essentially have no assets or business with which to reorganize. The bankruptcy filing was merely an impermissible choice of Magnolia Venture to litigate the ownership of the funds in federal court rather than the state court where the issue belongs.

Eleventh Amendment immunity has been revisited and reaffirmed on numerous occasions by lower federal courts since the

Court's recent decision in the case of Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Magnolia Venture seeks to use the decision in California v. Deep Sea Research, Inc., 523 U.S. ___, 118 S.Ct. 1464, 140 L.Ed.2d 626 (1998), which turns upon unique issues of admiralty law, to eviscerate Eleventh Amendment immunity in bankruptcy. MVCC unsuccessfully presented this Deep Sea Research contention to the Fifth Circuit in oral argument and again in its unsuccessful Petition for Rehearing.

Deep Sea Research concerned ownership of a private vessel shipwrecked in 1865. The "crux of this case" was whether California made a "colorable claim" pursuant to the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§2101-2106. (118 S.Ct. at 1471) California never possessed or owned the vessel, rather it was asserting a claim

in the unique admiralty situation.

In contrast, the State of Mississippi raised $20 million from the sale of general obligation bonds to fund the venture capital program of which Magnolia Venture was a part. These public funds were clearly owned and possessed by the State of Mississippi and were provided to Magnolia Venture, MCC, and MVCF, which are state instrumentalities, under the Mississippi Venture Capital Act of 1994 and through documentation effectuating the Act. The State of Mississippi has much more than a colorable admiralty claim. She has the enacting legislation, the Loan Agreement, the Pledge Agreement, the filed UCC-1 Financing Statement, the public funds derived from State general obligation bonds, and other such matters, all of which must be ignored and disregarded for Magnolia Venture to be successful in its asserted position. The Eleventh Amendment

bars adjudication of such matters in federal court.

The Deep Sea Research case dealt with the interaction between the Eleventh Amendment and the in rem admiralty jurisdiction of federal courts. The present matter is not an admiralty case, and thus this Court's ruling in Deep Sea Research is not applicable. In fact, the Deep Sea Research decision contains a sentence expressly supporting MDECD's position in the present case: "'It is...beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents.'" California v. Deep Sea Research, Inc., 523 U.S. at ____, 118 S.Ct. at 1472, quoting Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 711, 102 S.Ct. 3304, 3328, 73 L.Ed.2d

1057 (1982) (White, J., concurring in the judgment in part and dissenting in part).

Magnolia Venture urges extension of admiralty's possession of res theory to bankruptcy. In most instances, a state would not have physical possession of property of the debtor's estate. The result, therefore, would be avoiding Eleventh Amendment immunity protection in most bankruptcy proceedings. However, the State of Mississippi originated and possessed the funds at issue and retained an interest therein by law and through the documentation created with the venture capital program.

All Courts of Appeal that have recently addressed the constitutionality of Section 106(a) of the Bankruptcy Code, 11 U.S.C. §106(a), which purports to abrogate Eleventh Amendment immunity, have held such provision to be unconstitutional. See In

re Sacred Heart Hospital of Norristown, 133 F.3d 237 (3rd Cir. 1998); In re Creative Goldsmiths of Washington, D. C., Inc., 119 F.3d 1140 (4th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1517, 140 L.Ed.2d 670 (1998); and Department of Transportation and Development, State of Louisiana v. PNL Asset Management Co. (In re Fernandez), 123 F.3d 241 (5th Cir. 1997), amended on denial of reh'g, 130 F.3d 1138 (5th Cir. 1997). Eleventh Amendment immunity may not be abrogated by Congress in bankruptcy matters and may not be abrogated by extension of the federal court's unique role in admiralty cases to bankruptcy situations.

CONCLUSION

The Petition presents neither an important question of constitutional law nor a conflict with decisions of other federal courts of appeal. The Petition for

Writ of Certiorari should be denied.

Respectfully submitted this, the 28th day of January, 1999.

MISSISSIPPI DEPARTMENT OF
ECONOMIC AND COMMUNITY
DEVELOPMENT

/s/ _____

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